(2)

No. 90-279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HORACE D. McCOWAN, JR. and
SARAH E. McCOWAN,
Petitioners

v.

SEARS, ROEBUCK & Co., and
DEAN WITTER REYNOLDS INC.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS SEARS, ROEBUCK & CO. AND DEAN WITTER REYNOLDS INC. IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Where customers of a securities brokerage firm, in order to evade a valid and enforceable arbitration contract which they had signed, commenced different Federal Court lawsuits in two judicial districts, including one against the brokerage firm and another against the corporate grand-parent of the brokerage firm solely on a *respondeat superior* theory of vicarious liability for the alleged misdeeds of the brokerage firm, and where the Court of Appeals had undisputed jurisdiction over an appeal from the denial of a stay pending arbitration in the customers' lawsuit against the corporate grand-parent, but appellate jurisdiction over a closely-related appeal by the securities brokerage firm was disputed, was the Court of Appeals precluded from deciding identical issues raised in both appeals, particularly where (i) the decision of the issues in the corporate grand-parent's appeal (the action where alleged liability was entirely vicarious) required the Court of Appeals to determine the merits of all the issues raised by the other appeal, (ii) the two actions against the brokerage firm and its corporate grandparent had been consolidated prior to the appeal(s), and (iii) the District Court's denial of arbitration in the first appeal was clearly erroneous and inevitably would have required eventual reversal after protracted and totally pointless litigation?

2. Where those customers' efforts to evade their arbitration contract included multiple lawsuits arising out of identical transactions and facts, which thereby created a complex (and likely unique) procedural situation, and where the Court of Appeals acted to clarify that situation on the grounds that all the litigation arose from a single set of facts involving a single securities brokerage account and should be brought on for adjudication on the merits by the appropriate arbitral forum, and where no conflicts among the judicial circuits, no constitutional is-

sues and no questions of general public importance are alleged by the customers (who merely claim that the Court of Appeals acted unwisely or incorrectly), has any basis been shown upon which to grant a writ of certiorari for further appellate review by this Court?

PARTIES TO THE PROCEEDING

A list of the parties below is contained in the Petition. The following is a statement of the parent companies and subsidiaries (except wholly owned subsidiaries) of each corporation that is a party, provided pursuant to Rule 29.1 of this Court's Rules:

Sears, Roebuck & Co.; Dean Witter Financial Services Inc.; Dean Witter Reynolds Inc.; 134245 Canada Limited; Allstate Automobile & Fire Insurance Company Limited; Arden Fair Associates; Bay City Mall Associates; Carrefour Richelieu Realties Limited; Chandler Mall Associates; Chatham Centre Mall Limited; Citrus Park Venture; East Mesa Land Partnership; Hamden Mall Associates; H. Co. May Centers; H-D Lakeland Mall J.V.; H-D Pembroke J.V.; H-L Land Improvement Venture; H-L Mall Venture; H-L Office Venture; Hot Springs Mall Associates; Kelfor Holdings Limited; The Mall at Buckland Hills Partnership; New Park Associates; North 400 Venture; Prodigy Services; Regional Shopping Centres Limited; Saison Life Insurance Company, Ltd.; Samshin Allstate Life Insurance Company, Ltd.; Simon Homart San Antonio Mall Partnership; Simon Homart Shavano Partnership; Spring Creek Mall Associates; St. Laurent Centre (Partnership); Tires Plus Co.; Vista Ridge Joint Venture; Westgate Associates; The Woodlands Mall Assoc.

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v.

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BRIEF OF RESPONDENTS SEARS, ROEBUCK & CO. AND DEAN WITTER REYNOLDS INC. IN OPPOSITION

Respondents Sears, Roebuck & Co. ("Sears") and Dean Witter Reynolds Inc. ("Dean Witter") respectfully submit this Brief in opposition to the Petition of Horace D. McCowan, Jr. and Sarah E. McCowan (collectively "the McCowans") for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this case. The opinion of the Court of Appeals is not yet reported, but is provided in the Appendix to the Petition ("P. App.").

STATEMENT OF THE CASE

The McCowans claim that they lost money in a securities trading account by reason of non-disclosure and other misconduct by Dean Witter (P. App. at 62-66). Dean Witter and the McCowans had agreed in writing that "any controversy" between them would "be settled by arbitration" (P. App. at 75-76). All the lawsuits, appeals, orders, and various reported and unreported decisions of two District Courts and the Second Circuit, and the entire unique procedural tangle now presented to this Court, are the results of four years of increasingly frenzied effort by the McCowans to avoid arbitration notwithstanding this Court's decisions in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985).

The McCowans filed two District Court actions in 1986. The first (*"McCowan I"*, to use the Court of Appeals' terminology, *see* P. App. at 3) was commenced against Dean Witter only in the Southern District of New York and made claims under RICO, 18 U.S.C. § 1961, *et seq.*, and the Federal securities laws [2] that the transactions in their brokerage account with Dean Witter were unauthorized and that misrepresentations had been made by Dean Witter regarding their account. The second (*"McCowan II"*), a diversity case from which this Petition arises, was commenced in the Eastern District of Virginia, named both Dean Witter and Sears as defendants, and alleged that Dean Witter violated the antifraud provisions of the Securities Act of Virginia, Va. Code Ann. § 13.1-501, *et seq.* ("the Virginia Act"), in connection with transactions made in the McCowans' Dean Witter account in 1985 (P. App. at 61-67, 87-89). The complaint requested no relief against Dean Witter, but rather demanded "judgment against the defendant

[1] Claims were asserted under both the Securities Act of 1933 ("the Securities Act"), 15 U.S.C. § 77a, and the Securities Exchange Act of 1934 ("the Exchange Act"), 15 U.S.C. § 78a.

Sears, only," for damages for Dean Witter's alleged conduct (P. App. at 67) on the theory that Sears is a controlling person of Dean Witter under the Virginia Act and vicariously liable for Dean Witter's alleged violations of the statute.

The District Court in Virginia transferred *McCowan II* to the Southern District of New York, where it was consolidated with *McCowan I* already filed in that District in October 1986; *McCowan I* was based on the exact same transactions in the same brokerage account at issue in *McCowan II*.

In June 1987, Dean Witter and Sears filed a motion to dismiss *McCowan II* on the grounds that no relief was sought against Dean Witter, that the claims against Sears failed to state a claim for controlling person liability, and that the entire complaint failed to plead fraud with the required particularity. Alternatively, Dean Witter sought a stay pending arbitration under the Federal Arbitration Act, 9 U.S.C. § 3 (P. App. at 86).[2] At the time the motion was filed to dismiss or stay *McCowan II*, Dean Witter's motion to dismiss or stay *McCowan I* was already pending in the Southern District.

The District Court ruled on the motions to dismiss *McCowan I* and *McCowan II* in a decision issued in December 1987 and held that the arbitration provision in the customer's agreement between Dean Witter and the McCowans was valid, stayed the RICO and Exchange Act claims pending arbitration as required by this Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and dismissed the Securities Act claims with leave to replead. *McCowan v. Dean Witter Reynolds Inc.*, 682 F. Supp. 741 (S.D.N.Y. 1987). The District Court deferred ruling on the motion to dismiss the Virginia state law claim against Sears in *McCowan*

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[2] The arbitration clause in the McCowans' customer's agreement with Dean Witter is reproduced in P. App. at 75-76.

II pending the repleading of the Securities Act claims, and did not reach Dean Witter's alternative motion for a stay pending arbitration of *McCowan II*. *Id.* at 745.

The McCowans subsequently filed an amended complaint in *McCowan I* repleading their Securities Act claims, which was dismissed on Dean Witter's motion in April 1989 for failure to state a claim. *McCowan v. Dean Witter Reynolds Inc.*, 1989 Fed. Sec. L. Rep. (CCH) ¶ 94,423 (S.D.N.Y. April 12, 1989). The only other claims asserted in *McCowan I* had been stayed pending arbitration by the District Court's decision of December 1987. The McCowans appealed the orders dismissing the Securities Act claims and staying *McCowan I* pending arbitration of the RICO and Exchange Act claims; the Court of Appeals dismissed that appeal for lack of appellate jurisdiction since orders staying litigation pending arbitration are not immediately appealable. *McCowan v. Dean Witter Reynolds Inc.*, 889 F.2d 451 (2d Cir. 1989).

As of June 1989, all the *McCowan I* claims (*i.e.*, all the claims for relief against Dean Witter) that had not been dismissed had been stayed by the District Court pending arbitration, but the District Court had not ruled on the motion of Dean Witter and Sears to dismiss or stay *McCowan II*. As a consequence, Dean Witter and Sears filed a renewed motion to dismiss or, in the alternative, to stay *McCowan II*. Dean Witter requested a stay under § 3 of the Federal Arbitration Act, pending arbitration of the allegations that Dean Witter violated the Virginia Act. Sears moved for a discretionary stay of the state law claims asserted against it, pending arbitration of the matter as to Dean Witter. In that motion, Sears argued that the claim of controlling person liability should be dismissed for failure to state a claim, so Sears did not at that time seek to have the claim against it—the only claim for relief in *McCowan II*—referred to arbitration based upon the customer's agreement with Dean Witter.

On October 5, 1989, the District Court denied the motion to dismiss or stay *McCowan II* (P. App. at 39-53).[3] Dean Witter filed a motion for reconsideration under Local Rule 3(j) of the Southern District of New York, which was denied, and filed a Notice of Appeal on November 6, 1989.

Sears filed in November 1989 a motion under § 3 of the Federal Arbitration Act seeking a stay and referral of the Virginia Act claims against Sears to arbitration. Because the District Court had held in its October 1989 opinion that Sears is a controlling person of Dean Witter under the Virginia Act (P. App. at 46), Sears asserted its right to enforce the arbitration agreement because the McCowans' claims against Sears alleged only derivative and vicarious liability for the acts of Dean Witter. On January 17, 1990, the District Court denied Sears' motion for a stay under § 3 of the Federal Arbitration Act based solely on a finding that Sears was an incidental, rather than an intended, beneficiary of the customer's agreement between Dean Witter and the McCowans (P. App. at 56-60).

Sears filed a notice of appeal from the January 17, 1990 order on January 24, 1990, since interlocutory orders denying stays pending arbitration are immediately appealable under the Federal Arbitration Act, 9 U.S.C. § 15(a)(1)(A) (P. App. at 86). The appeal from the January 1990 decision denying Sears a stay pending arbitration was consolidated in the Court of Appeals with the appeal from the October 1989 decision denying Dean Witter a stay.

It is undisputed that the Court of Appeals had jurisdiction over the appeal from the January 1990 order denying Sears a stay under § 3 of the Federal Arbitra-

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[3] The District Court's opinion was filed October 5, 1989, although it is "dated" October 12, 1989, apparently a typographical error (P. App. at 53).

tion Act. With respect to the appeal from the October 1989 decision denying Dean Witter a stay, however, the Court of Appeals treated Dean Witter's motion for reconsideration as a motion under Rule 59(e) of the Federal Rules of Civil Procedure and regarded Dean Witter's Notice of Appeal as two days premature (P. App. at 10-11), conclusions with which Dean Witter disagrees but which have no direct bearing on the instant Petition. The Court of Appeals recognized nonetheless that the appeal from the January 1990 order as to Sears "requires analysis of the arbitration agreement entered into by the plaintiffs and Dean Witter" and an "examination of the relationship between the defendants and the basis upon which the plaintiffs assert liability against them" (P. App. at 13).

Emphasizing that no recovery against Sears as a controlling person is possible unless the McCowans first prove their contention that Dean Witter violated the Virginia Act (P. App. at 15), the Court of Appeals concluded that under § 3 of the Federal Arbitration Act the issue of whether Dean Witter violated the Virginia Act must be arbitrated in accordance with the arbitration clause in the customer's agreement (P. App. at 17). As a result, the Court of Appeals concluded that the claim for relief against Sears in *McCowan II*, which is wholly dependent on the allegations against Dean Witter, also could not proceed. The Court of Appeals stayed the entire *McCowan II* action pending arbitration (P. App. at 20).[4]

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[4] In December 1989, two years after the District Court stayed *McCowan I* pending arbitration of the RICO and Exchange Act claims, the McCowans filed a Demand for Arbitration with the American Arbitration Association asserting claims against Dean Witter under those statutes and for common law conversion and breach of contract. The case is scheduled to be heard by a panel of arbitrators in Richmond, Virginia on September 24, 1990 through September 28, 1990. A copy of the Notice of Hearing is provided in the Appendix to this Brief ("R. App.").

As this unduly convoluted matter now stands, all claims for relief against Dean Witter arising from the facts alleged in both *McCowan I* and *McCowan II* are to be arbitrated in several weeks. All claims for relief against Sears arising from the same facts—the *McCowan II* claims for relief—have been stayed at the direction of the Court of Appeals. In advance of the results of that arbitration (*see* R. App.), the McCowans ask this Court to review the Court of Appeals' interlocutory determination, apparently in an effort to litigate in the District Court their state law claims against Sears for the alleged misdeeds of Dean Witter, a litigation which can only reach a result after the McCowans' claims against Dean Witter have been decided on the merits by the arbitrators. In short, the McCowans seek relief which is simultaneously lacking in general importance (since the procedural snarl of *McCowan I and II* is hard to replicate), interlocutory, inefficient, and in all likelihood moot.

REASONS FOR DENYING THE WRIT

This case does not raise issues appropriate for the exercise of this Court's discretionary review by certiorari. It does not present any conflict between a decision of this Court and the decision of the Court of Appeals, or any conflict between decisions of several courts of appeals. Nor does it raise any important question of constitutional or federal law. The sole significant issue, *viz.*, whether the McCowans are bound by their arbitration contract no matter how much they object or how many times they sue or appeal, has already been decided in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985).

In reviewing the interlocutory order denying Sears a stay pending arbitration, where Sears' right to arbitration is dependent on Dean Witter's right to arbitration, the Court of Appeals was required to determine whether the

underlying claim against Dean Witter is subject to arbitration and correctly did so. The unique procedural posture of the case and the unusual position of Sears and Dean Witter as defendants and respondents—circumstances created by the McCowans' litigation strategies to evade their arbitration contract—suggest no reason for review by this Court and indeed weigh against the granting of interlocutory review of this exceptionally fact-bound matter.

I. THE COURT OF APPEALS HAD JURISDICTION OVER THE SEARS APPEAL AND IN HEARING THAT APPEAL WAS REQUIRED TO DETERMINE WHETHER THE ARBITRATION CLAUSE IN THE DEAN WITTER CUSTOMER AGREEMENT WAS VALID AND WHETHER THE CLAIMS BROUGHT UNDER THE VIRGINIA SECURITIES ACT FALL WITHIN THE SCOPE OF THAT ARBITRATION CLAUSE

The Petition focuses almost exclusively on the appeal from the October 1989 decision denying Dean Witter a stay under the Federal Arbitration Act, and ignores the fact that in the Sears appeal, as to which no jurisdictional issue exists, it was necessary for the Court of Appeals to determine whether the underlying dispute between the McCowans and Dean Witter is arbitrable. In other words, review of the order denying Sears a stay under § 3 of the Arbitration Act required a determination as to whether the arbitration clause in the customer's agreement with Dean Witter is enforceable and whether the Virginia state law claims asserted in this action fall within the scope of that arbitration clause. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 630 (1985). *See also Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987) (citing *Mitsubishi*).

The McCowans assert that the issues of whether Dean Witter and Sears are each entitled to stays are "totally

independent if not exclusive of each other" (Pet. at 8). This simply ignores the long line of cases holding that a non-signatory who is alleged to be vicariously or derivatively liable for the actions of a signatory to an arbitration agreement may be bound by, and may enforce, the arbitration proviso. Thus, for example, where there is an agency relationship between the signatory and the non-signatory, the non-signatory may enforce or be bound by the arbitration agreement. *See, e.g., Interbras Cayman Co. v. Orient Victory Shipping Co.*, 663 F.2d 4, 6 (2d Cir. 1981); *In re Oil Spill by the Amoco Cadiz*, 659 F.2d 789, 796 (7th Cir. 1981). Similarly, where a parent company or shareholder exercises control over the signatory so as to be an "alter-ego" or to justify piercing the corporate veil, the non-signatory parent or shareholder can both enforce and be bound by the arbitration agreement. *See, e.g., Farkar Co. v. R. A. Hanson DISC, Ltd.*, 583 F.2d 68, 70-71 (2d Cir. 1978); *Fisser v. Int'l Bank*, 282 F.2d 231, 234-35 (2d Cir. 1960). Whatever legal theory is relied upon to give the non-signatory the benefit or obligation of the arbitration agreement, the reasoning is the same: having sought to hold the non-signatory vicariously liable for damages for the actions of the signatory, the plaintiff cannot deny the non-signatory the benefit of the arbitration agreement. *See J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988). *See also McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984); *In re Oil Spill by the Amoco Cadiz*, 659 F.2d at 796.

This line of authority is not, as suggested by the McCowans (Pet. at 10-11), inconsistent with the principle that parties cannot be required to arbitrate absent an agreement to do so, but rather relies on basic common law notions to determine when principals, parent corporations, and others alleged to be vicariously liable for the conduct of their agents and subsidiaries can be bound by, and enforce, arbitration agreements entered into by

the entities for whose conduct they are being held responsible: the "variety of ways in which a [non-signatory] . . . may become bound . . . is limited only by generally operative principles of contract law." *Fisser v. Int'l Bank*, 282 F.2d at 233.

For the McCowans to urge this Court (Pet. at 10) to grant the Petition on grounds that the decision of the Court of Appeals "directly conflicts with this Court's reasoning and comments in *Volt*, 109 S. Ct. at 1254 n.5" is captious. That footnote 5 in *Volt Information Sciences, Inc. v. Board of Trustees*, 109 S. Ct. 1248 (1989), merely observes that the Federal Arbitration Act "itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate." Similarly, that portion of the decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), alleged (Pet. at 10) to be contradicted by the Court of Appeals' decision, holds only that an independent architectural firm hired to oversee a construction project cannot be required to arbitrate without its consent where the only arbitration clause is in a contract between the project owner and the general contractor. 460 U.S. at 4, 19-20. Neither point is significant in this case where a parent corporation, which is alleged only to be vicariously liable for the conduct of its subsidiary, seeks to enforce for its own benefit an arbitration clause in its subsidiary's contract with the plaintiff.

II. APPELLATE JURISDICTION WAS PROPERLY EXERCISED

The rubrics of pendent appellate jurisdiction and the scope of interlocutory appellate review are frequently treated as interchangeable and described in imprecise language; Professors Charles Alan Wright and Arthur Miller begin their commentary on "pendent and retained jurisdiction" with the observation that:

> A court of appeals may occasionally decide questions going beyond the obvious limits authorized by the appeal or petition before it. Many of the illustrations that might be offered involve nothing more than intelligent definition of the scope of interlocutory appeals, in light of the fact that the immediate occasion for appeal may warrant or even require consideration of closely related issues. . . .

16 C. Wright & A. Miller, *Federal Practice and Procedure* § 3937 (1977). They also observe that "jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development." *Id.* at § 3921. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 756-57 (1986); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940); *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 837 n.1 (9th Cir. 1986); *Intermedics Infusaid, Inc. v. Regents of Univ. of Minnesota*, 804 F.2d 129, 134 (Fed. Cir. 1986); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1023 (6th Cir. 1979); *Lee v. Ply*Gem Indus., Inc.*, 593 F.2d 1266, 1270 (D.C. Cir.), *cert. denied*, 441 U.S. 967 (1979); *McCreary Tire & Rubber Co. v. Ceat S.p.A.*, 501 F.2d 1032, 1037-38 (3d Cir. 1974).

In this case,[5] disposition of the Sears appeal, as to which there is no jurisdictional issue, required a determination of whether the arbitration agreement between the McCowans and Dean Witter is enforceable and whether the Virginia Act claims fall within the scope of that agreement.[6] Sears' right to a stay depends on the

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[5] It should be noted, although the McCowans pretend to forget, that "this case" includes both *McCowan I* and *McCowan II*, which were consolidated (P. App. at 3).

[6] Contrary to the arguments advanced in the Petition, there is no conflict or inconsistency between the Court of Appeals' necessary

enforceability and scope of Dean Witter's arbitration clause, and the Court of Appeals could not grant Sears full relief without determining whether Dean Witter was entitled to arbitration of the Virginia state law allegations. Had only Sears, and not Dean Witter, moved for a stay pending arbitration, or had Sears been the only defendant named in the case, an appeal from a denial of a stay as to Sears would have involved the same examination of the underlying issues as to Dean Witter. It hardly rises to the level appropriate for certiorari review to ask this Court to entertain this interlocutory matter simply to determine (i) whether as a matter of language or labelling the Court of Appeals exercised pendent appellate jurisdiction, or (ii) whether the Court of Appeals merely recognized that the scope of review as to Sears necessarily included consideration of all those fully briefed issues on which Sears' rights depend, and having performed that review, decided to correct a plain and closely-related error and to remand Dean Witter to arbitration before, rather than after, a long lawsuit and trial.

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determination of the issue regarding Dean Witter's arbitration agreement with the McCowans, and the decisions in *Abney v. United States*, 431 U.S. 651 (1977), that where a district court's rejection of a criminal defendant's double jeopardy claim is immediately reviewable under the narrow "collateral order" exception to the final judgment rule, other grounds for dismissal of the case rejected by the district court are reviewable at that time only if they satisfy the requirements of the "collateral order" exception, or in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), where the appeal of one of sixteen appellants was barred because due to a clerical error his name did not appear on the notice of appeal.

III. THE COURT OF APPEALS REACHED THE CORRECT RESULT IN STAYING YEARS OF LITIGATION DESIGNED SOLELY TO DENY BOTH DEAN WITTER AND SEARS THEIR STATUTORY AND CONTRACTUAL RIGHTS TO ARBITRATION

The Court of Appeals reached the correct result in staying this entire action pending arbitration of the McCowan's claims under the Virginia Act. The Petition does not purport to challenge the validity of the arbitration clause, or to contend that the Virginia Act claims are otherwise not subject to arbitration.[7]

Rather, the McCowans insist in the Petition that because they request no damages from named defendant Dean Witter in *McCowan II*, they have no "claim" against named defendant Dean Witter under the Virginia Act and therefore no "claim" to refer to arbitration. (Pet. at 8-9). The Court of Appeals cut through these semantics, observing:

> Although fashioned as two separate lawsuits, there is in reality a single "controversy" at issue—as that term would have been understood by the contracting parties—giving rise to claims under three separate laws: the 1934 Act, RICO and the Virginia Securities Act. The first two demand a money judgment from Dean Witter; the third requires a showing of liability against Dean Witter as a predicate to recovery against Sears, but demands no monetary judgment from Dean Witter (P. App. at 17).

The arbitration clause requires arbitration of "any controversy" (P. App. at 75), and § 3 of the Federal Arbitration Act speaks of arbitrable issues, not claims for relief, and requires that courts stay litigation pending arbitration "if any suit . . . be brought . . . upon any

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[7] The state law claims are not in any respect exempt from arbitration. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); *Newcome v. Esrey*, 659 F. Supp. 100, 104 (W.D.Va. 1987), *aff'd*, 862 F.2d 1099 (4th Cir. 1988).

issue referable to arbitration under an agreement in writing for such arbitration." 9 U.S.C. § 3 (emphasis added) (P. App. at 86).

This Court has recognized that the congressional intent underlying the Federal Arbitration Act includes an intent "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). In directing that this entire case be stayed pending arbitration, the Court of Appeals sought to conclude an effort of nearly four years by the McCowans to avoid arbitration. Indeed, counsel for the McCowans acknowledged at oral argument in the Court of Appeals that the reason for the multiple actions was to attempt to avoid arbitration of the Virginia state law claim.

No final judgment has been entered in either *McCowan I* or *McCowan II*; both cases are stayed pending arbitration. Following the issuance of an award in the *McCowan I* arbitration scheduled to be tried in this month, there will doubtless be further court proceedings when the parties attempt to confirm or vacate the award, leading to an appealable final judgment. All the issues raised and preserved by the McCowans, by Sears and by Dean Witter in the litigation can then be heard on appeal. There is no reason for this Court to grant review of this matter at what is, notwithstanding that the case was filed in 1986, an interlocutory and preliminary stage in the litigation.

CONCLUSION

For these reasons, respondents urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

Notice of Hearing Before
American Arbitration Association

AMERICAN ARBITRATION ASSOCIATION

Case Number: 16 136 00674 89G

IN THE MATTER OF THE ARBITRATION BETWEEN
HORACE D. MCCOWAN, JR., & SARAH E. MCCOWAN

AND

DEAN WITTER REYNOLDS INC.

NOTICE OF HEARING

Charles W. Laughlin, Esq.	Robert E. Payne
Thompson & McMullan	McGuire, Woods, Battle,
100 Shockoe Slip	& Boothe
3rd Floor	One James Center
Richmond, VA 23219	Richmond, VA 23219

Please Take Notice that a Hearing in the above-entitled Arbitration will be held at the Arbitration Tribunal of the American Arbitration Association.

AT:	Richmond, Virginia—To Be Determined
DATE:	September 24-28, 1990
TIME:	10:00 am
BEFORE:	Morris G. Sahr William H. Malloy, Jr., Esq. John P. Connolly, Esq.

Please attend promptly with your witnesses and be prepared to present your proofs.

Jay Gordon
Case Administrator

Dated: May 30, 1990

NOTICE: The Arbitrator(s) have arranged their schedule and reserved the above date to meet the convenience of the Parties. Therefore, every effort should be made to appear on the date scheduled. In the event that unforeseen circumstances make it impossible to attend the hearing as scheduled, the Parties are to request a postponement no less than 48 hours before the time and date set for hearing. All requests for postponements must be communicated to the Case Administrator (not the Arbitrator). There should be no communication between Parties and the Arbitrator other than at oral hearings.

cc: Arbitrator(s)

Form 8-AAA-C-1/82